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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-027249 04/24/2013

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

STATE OF ARIZONA, et al.

JEFFREY D CANTRELL

v.

WILLIAM W ARNETT

ROBERT L GREER

DRUE A MORGAN-BIRCH

UNDER ADVISEMENT RULING

A bench trial was held in this matter on April 8, 9, and 10, 2013. By stipulation, this was a severed trial on limited issues. Based on the evidence presented and the parties' legal briefing (including briefing on the cross-motions for summary judgment), the court makes the following findings, conclusions and orders.

I. BACKGROUND.

Defendant William Arnett and his wife owned property in Tucson on which was an underground storage tank ("UST"). He used the property for his taxi business, which was incorporated as Yellow Cab Company of Tucson, Inc. ("Yellow Cab"). Yellow Cab was wholly owned by a company that was wholly owned by Mr. Arnett and his wife.

The UST on Mr. Arnett's property leaked and Plaintiff Arizona Department of Environmental Quality ("ADEQ") initiated enforcement proceedings. In 1993, ADEQ and Yellow Cab entered into a Consent Order concerning the clean-up of the site. In 1995, they entered into a Consent Decree in Maricopa County Superior Court Case No. CV 1995-011401. Mr. Arnett is not a named party in the Consent Decree, but signed it as president of Yellow Cab.

Yellow Cab subsequently went bankrupt. In 2010, ADEQ brought this action against Mr. Arnett personally, seeking to enforce Arizona environmental laws against him as the owner of the UST. The parties agreed to a severed trial to resolve certain issues concerning the effect of the 1995 Consent Decree on ADEQ's claims.

II. FINDINGS OF FACT.

1. The court adopts as its findings the stipulations of fact contained in the Joint Pretrial Statement.

2. Mr. Arnett was an owner of real property at 411 North 5th Avenue in Tucson, Arizona (the "Property").

3. Mr. Arnett's wife, who is deceased, was the only other owner.

4. Mr. Arnett and his wife bought the Property in 1982.

5. Mr. Arnett sold the Property to Kimberlee Turk in 2007.

6. The UST was a fixture on the Property. Thus, when Mr. Arnett became an owner of the Property, he also became an owner of the UST.

7. There was, at one time, also a fuel dispenser on the Property.

8. Mr. Arnett and his wife leased the Property to Yellow Cab Company of Tucson, Inc.

9. Yellow Cab was a taxi business. It used the Property for its business, including the fueling of taxis and the storage of fuel for taxis.

10. Yellow Cab was wholly owned by Checker Leasing, Inc., which was wholly owned by Mr. Arnett and his wife.

11. Mr. Arnett was an owner of the UST as that term is defined in A.R.S. § 49-1001.01 and the 1989 version of that law.

12. Although Yellow Cab may have leased the Property and the UST from Mr. Arnett, or otherwise had Mr. Arnett's permission to use the UST, that did not make it an owner of the UST.

13. Yellow Cab was the operator of the UST as that term is defined in A.R.S. § 49-1001 and the 1989 version of that law.

14. The UST failed a tank tightness test on October 20, 1988, but neither Mr. Arnett nor Yellow Cab notified ADEQ of a suspected Release within 24 hours.

15. The UST failed a tank tightness test on November 2, 1988, but neither Arnett nor Yellow Cab notified ADEQ of a suspected Release within 24 hours.

16. Tucson Fire Department inspected the UST on February 14, 1990 and ordered Yellow Cab to empty it within 48 hours, assess the extent of contamination by February 28, 1990, and remediate any unauthorized discharges.

17. Mr. Arnett reported a failed tank tightness test to ADEQ on February 23, 1990. The "Incident Report" submitted to ADEQ identifies Yellow Cab as the "Responsible Party."

18. The "Incident Report" form does not ask who the "owner" or "operator" of the UST is.

19. On March 5, 1990, Yellow Cab submitted to ADEQ a "Notification for Underground Storage Tanks" form.

20. In the Notification for Underground Storage Tanks form, "Yellow Cab Company" is identified as the owner of the UST.

21. Arizona's regulatory scheme for UST's depends on UST owners to self-report.

22. ADEQ relies on the owner's notification regarding a leak with respect to who is the owner of the UST.

23. ADEQ relied on the Notification for Underground Storage Tanks form to treat Yellow Cab as the owner.

24. It was reasonable for ADEQ to rely on this form as an indication of ownership of the UST.

25. The UST was removed from the Property on March 6, 1990.

26. A Site Characterization Report dated September 27, 1990 and submitted to ADEQ by Yellow Cab states that the site is "currently operated and owned by Yellow Cab."

27. Various other submissions to ADEQ identified Yellow Cab as the site's owner.

28. On May 5, 1993, ADEQ issued a Compliance Order to Yellow Cab.

29. The Compliance Order states that ADEQ received UST notification forms identifying Yellow Cab as the owner of the UST.

30. Yellow Cab requested a hearing on the Compliance Order.

31. At the time the Compliance Order was issued, Mr. Arnett knew that ADEQ was treating Yellow Cab as the UST's owner.

32. Mr. Arnett also had reason to know that his agents had represented Yellow Cab as the UST's owner and operator.

33. Neither when the Compliance Order was issued nor before did Mr. Arnett inform ADEQ that he and his wife were the actual owners of the UST.

34. On December 13, 1993, ADEQ and Yellow Cab entered into a Consent Order.

35. Mr. Arnett signed the Consent Order as President of Yellow Cab.

36. The Consent Order states that Yellow Cab is the "owner/operator" of the facility on which the UST is located.

37. This was a misrepresentation in part. Although Yellow Cab was the UST's operator, Mr. Arnett and his wife were its owners.

38. At the time of the Consent Order, Mr. Arnett knew that he and his wife, not Yellow Cab, owned the Property and the UST.

39. At the time of the Consent Order, ADEQ did not know that Mr. Arnett and his wife owned the UST.

40. Mr. Arnett did not tell ADEQ at the time of the Consent Order or before that he was an owner of the UST.

41. Mr. Arnett's misrepresentation in the Consent Order that Yellow Cab was the UST's owner, and his failure to disclose that he and his wife were the owners, were not done with the intent to deceive ADEQ. Nonetheless, these constituted negligent misrepresentations.

42. Mr. Arnett did not exercise reasonable care to ensure that ADEQ was informed of the correct owner of the UST at the time the Consent Order was entered into.

43. ADEQ subsequently filed suit in Superior Court against Yellow Cab.

44. At the time it filed the lawsuit, ADEQ did not know that Arnett owned the Property and the UST instead of Yellow Cab.

45. At the time it filed the lawsuit, ADEQ knew Arnett was a "responsible corporate officer" of Yellow Cab.

46. The lawsuit was resolved by a Consent Decree entered on July 17, 1995.

47. The Consent Decree states that Yellow Cab "was the owner of an underground storage tank, located at 411 North 5th Avenue, Tucson, Arizona, from which a release, as defined in A.R.S. § 49-1001(14), occurred."

48. Mr. Arnett signed the Consent Decree as President of Yellow Cab.

49. In the Consent Decree, Mr. Arnett represented that he "agrees with the statements" made in it.

50. This constituted a representation that Yellow Cab owned the UST.

51. At the time he signed the Consent Decree, Mr. Arnett knew that he and his wife, not Yellow Cab, owned the Property and the UST.

52. Mr. Arnett failed to disclose this fact to ADEQ.

53. At the time the Consent Decree was entered into, ADEQ did not know that Mr. Arnett and his wife owned the UST.

54. ADEQ reasonably relied on Mr. Arnett and his authorized agents with respect to who owned the UST.

55. Mr. Arnett's misrepresentation in the Consent Decree that Yellow Cab was the UST's owner, and his failure to disclose that he and his wife were the owners, were not done with the intent to deceive ADEQ. Nonetheless, these constituted negligent misrepresentations.

56. Mr. Arnett did not exercise reasonable care to ensure that ADEQ was informed of the correct owner of the UST at the time the Consent Decree was entered into.

57. The Consent Decree further states that it "shall apply to and be binding upon Yellow Cab and its officers, directors, agents, employees, successors, and assigns, and upon the State of Arizona."

58. At various times, ADEQ had information that an astute reader might have interpreted as suggesting Yellow Cab might not be the owner of the UST. For example, a December 27, 1996 Site Characterization Report listed Yellow Cab as the "Owner/Operator" but stated that the "currently vacant land is owned by Mr. William W. Arnett."

59. But at no time before the Consent Decree was entered, or for several years afterwards, did Mr. Arnett or anyone representing him inform ADEQ directly that the Consent Decree wrongly named Yellow Cab as the owner of the UST.

60. Had ADEQ conducted a title search, it could have discovered that Mr. Arnett was the owner of the Property.

61. At least as early as December 2001 (and probably earlier), ADEQ became aware of Yellow Cab's poor financial condition and the possibility of bankruptcy.

62. Around the same time, ADEQ personnel became cognizant of the fact that Yellow Cab might not own the Property, though there were clues of that fact earlier.

63. Yellow Cab filed for bankruptcy in 2003 and was administratively dissolved in 2004.

64. In a February 2005 deposition, Mr. Arnett told ADEQ's counsel in response to questioning that he owned the Property personally. It is clear from the context of the question that ADEQ knew this fact before the deposition.

III. CONCLUSIONS OF LAW.

A. Is ADEQ's Claim Against Mr. Arnett As An Owner Barred By Res Judicata?

In this action, ADEQ asserts the same claims against Mr. Arnett as owner of the UST that it asserted against Yellow Cab as owner and/or operator in the 1995 lawsuit. Among other things, it alleges that Mr. Arnett as an owner is responsible for cleanup costs and penalties by virtue of his having violated Arizona law with respect to the UST. Mr. Arnett asserts that this claim is barred by res judicata (or claim preclusion). If ADEQ wanted to hold him personally liable, Mr. Arnett argues, it could have and should have sued him in 1995 and made him a party to the Consent Decree.

A judgment in one action bars the plaintiff from bringing a subsequent action asserting the same claim against the same defendant or its privies (or privities). *O'Neil v. Martin*, 66 Ariz. 78, 85, 182 P.2d 939, 943 (1947); *Corbett v. ManorCare of America, Inc.*, 213 Ariz. 618, 630, 146 P.3d 1027, 1039 (App. 2006). There is no dispute here that Mr. Arnett was a privy of Yellow Cab as its owner (through Checker Leasing), its president, and the person who controlled the prior litigation on its behalf. Thus, unless an exception applies, the 1995 Consent Decree bars this subsequent lawsuit.

One exception is where the defendant's own misrepresentation prevented the plaintiff from suing him in the first lawsuit. Comment j to Section 26 of the Restatement of Judgments describes this principle:

> A defendant cannot justly object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud. . . . The result is the same when the defendant was not fraudulent, but by an innocent misrepresentation prevented the plaintiff from including the entire claim in the original action. . . . The result is different, however, where the failure of the plaintiff to include the entire claim in the original action was due to a mistake, not caused by the defendant's fraud or innocent misrepresentation.

Restatement (Second) of Judgments 26 (1982), cmt. j. Though no Arizona case has addressed this principle, several outside Arizona have endorsed it. *See, e.g., Western Sys. v. Ulloa*, 958 F.2d 864, 871-872 (9th Cir. 1992); *Blake v. Charleston Area Medical Center*, 498 S.E.2d 41, 49 (W.Va. 1997).

The Restatement rule strikes a balance between the need for finality in judgments with the inequity of allowing a party to escape responsibility through its own misrepresentation. It does so by allowing a subsequent lawsuit where the plaintiff failed to name the defendant in the prior lawsuit due to the defendant's fraud or innocent misrepresentation, but precluding a subsequent lawsuit when the plaintiff's failure to sue the defendant arose from mistake. To the extent Mr. Arnett argues that only fraud should suffice, the argument is rejected in favor of the Restatement's approach.

The burden of proving this exception to the ordinary principle of res judicata is ADEQ's, and it met that burden. The court has found that Mr. Arnett misrepresented Yellow Cab as the owner of the UST, that ADEQ relied on his representation in bringing suit against Yellow Cab, and that ADEQ's reliance was reasonable. Based on these findings, res judicata does not preclude ADEQ's lawsuit against Mr. Arnett as owner of the UST.

The court rejects Mr. Arnett's argument that the availability of ownership information in the public record precludes ADEQ from reasonably relying on Mr. Arnett's representation. *See* A.R.S. § 33-416 ("The record of a grant, deed or instrument in writing authorized or required to be recorded, which has been duly acknowledged and recorded in the proper county, shall be notice to all persons of the existence of such grant, deed or instrument. . . ."). A.R.S. § 33-416 applies to real estate transactions; it does not mean that, in other contexts, no person can ever rely on a representation concerning property ownership. Rather, the question is whether, under all the circumstances, it was reasonable for ADEQ to rely on Mr. Arnett's representations regarding ownership. This question of reasonableness is for the finder of fact, and the court has found that ADEQ's reliance was reasonable.

This finding is consistent with Title 49's self-reporting scheme. ADEQ does and should be able to rely on UST owners to self-disclose, and should not have to investigate ownership before entering into a consent order or decree.

Mr. Arnett argues that relief from the judgment must be obtained through Rule 60. Here, however, ADEQ is not trying to have the Consent Decree set aside; rather, Mr. Arnett is asserting the Consent Decree as a defense. In that circumstance, the severed trial in this action was the appropriate forum for resolving the res judicata issue. *See* Restatement (Second) of Judgments § 80 (1982) ("When a judgment is relied upon as the basis of . . . defense in a subsequent action, relief from the judgment may be obtained by appropriate pleading and proof in that action . . . .).

B. Was ADEQ Required To Issue A Compliance Order To Mr. Arnett Before Filing Suit?

Mr. Arnett argues that, even if ADEQ can bring suit against him, it was required to first issue an order of compliance. He bases this argument on A.R.S. § 49-1013. Subsection A of that statute states:

> If the director determines that a person is in violation of this chapter or the rules adopted pursuant to this chapter ***the director may issue an order requiring compliance within a reasonable time***. A compliance order becomes final thirty days after the order is served unless within thirty days of service the person named on the order requests a hearing. A hearing shall be conducted pursuant to title 41, chapter 6, article 10. A compliance order that is the subject of a hearing as prescribed by this section becomes final and subject to appeal on the decision of the director to uphold the compliance order. Except as provided in section 41-1092.08, subsection H, the director's final decision may be appealed by any party to the superior court pursuant to title 12, chapter 7, article 6. ***A person becomes the subject of an enforcement proceeding pursuant to this chapter when a compliance order against that person becomes final***.

(Emphasis added.) Subsection H states:

> ***The director may file an action in the superior court to enforce this chapter and to collect penalties for violations of this chapter***. The director may seek all appropriate relief including temporary and permanent injunctions.

(Emphasis added.) Taken together, Mr. Arnett argues, these two provisions require that the Director first issue a compliance order, and only after a compliance order is the person subject to an enforcement proceeding in Superior Court.

No case law is cited interpreting these provisions, but Subsection H is clear on its face: the Director may file an action to enforce the UST laws or to collect penalties for violating them. Had the Legislature intended to make a compliance order a prerequisite to a lawsuit, it would have said so expressly.

The last sentence of Subsection A, which addresses when a person "becomes the subject of an enforcement proceeding," is designed to address eligibility for reimbursement of corrective costs under A.R.S. § 49-1052. *See* A.R.S. § 49-1052(F)(3) ("The underground storage tanks included in the application for coverage are located at a site that is the subject of an enforcement proceeding under § 49-1013. . . ."). That provision was not intended to limit when the Director could file suit.

C. To What Extent Is Mr. Arnett Bound By The Consent Decree?

The Pretrial Statement raises the issue of whether and to what extent Mr. Arnett is bound by the Consent Decree. The court has ruled that the Consent Decree does not bar the State from bringing this action against Mr. Arnett. Conversely he is not bound by it. The provisions of the Consent Decree were intended to impose requirements on Yellow Cab, and it would be inequitable to bind Mr. Arnett to penalties and other duties that he agreed to on the understanding that they would be the responsibility of Yellow Cab.

The language in the Consent Decree stating that it binds Yellow Cab's officers means only that they must comply with its provisions as officers of Yellow Cab. It does not mean that officers are personally liable for Yellow Cab's financial obligations under the Consent Decree.

The court makes no ruling regarding whether factual assertions or admissions made in the Consent Decree are binding on Mr. Arnett.

D. Is ADEQ's "Controlling Person" Claim Barred By Res Judicata?

In addition to seeking to impose liability on Mr. Arnett as the UST's owner, ADEQ asserts that he is responsible for Yellow Cab's failure to comply with the Consent Decree under the responsible corporate officer doctrine. The court need not decide whether Arizona would adopt the responsible corporate officer doctrine, however, because any such theory is barred by res judicata.

As discussed above, res judicata precludes a plaintiff from obtaining a judgment and then bringing a subsequent lawsuit against the defendant or its privies asserting the same claim. The same "claim" includes all causes of action that were or could have been brought. *Mullenaux v. Graham County*, 207 Ariz. 1, 7, 82 P.3d 362, 368 (App. 2004). Even if ADEQ thought Yellow Cab was the UST's owner in 1995, it clearly knew Mr. Arnett was a responsible corporate officer. Had it wanted to hold Mr. Arnett liable personally as a responsible corporate officer, it could have brought suit against him then.

ADEQ argues that Mr. Arnett is liable for Yellow Cab's post-1995 conduct as a responsible officer. By 1995, however, the UST was already removed. After 1995, Yellow Cab could only be accused of doing two things wrong: failing to remediate the Release and failing to comply with the Consent Order. The former would be a continuation of the pre-1995 violations and, as such, any new claim based on the same continuing violation would be barred by res judicata.

As to the latter, Mr. Arnett was not personally a party to the Consent Decree, so he cannot be personally liable for Yellow Cab's failure to comply with it. Regardless of whether the responsible corporate officer doctrine would have allowed ADEQ to sue Mr. Arnett along with Yellow Cab in 1995, it does not allow ADEQ to hold Mr. Arnett personally liable under a Consent Decree to which he was not personally a party. Such a rule would essentially make him a guarantor of Yellow Cab's agreed obligations. It is one thing to hold a responsible corporate officer liable for environmental damage he was in a position to control; it is another to bind him to financial undertakings made on behalf of the corporation with no notice that he might personally be liable for them.

E. Are ADEQ's Claims Barred By Collateral Estoppel, Judicial Estoppel, Equitable Estoppel, Waiver, Laches, Unclean Hands Or Election Of Remedies?

Although his primary argument is res judicata, Mr. Arnett raises a number of other defenses. In the Pretrial Statement, he raises the defenses of collateral estoppel, judicial estoppel, equitable estoppel, waiver, laches, unclean hands, and election of remedies. In his trial brief, however, he only argues three: collateral estoppel, judicial estoppel, and laches.

Collateral estoppel (or issue preclusion) only applies to matters actually litigated. Because the 1995 lawsuit was resolved by consent, collateral estoppel does not apply. *See In re General Adjudication*, 212 Ariz. 64, 70 n.8, 127 P.3d 882, 888 (2006) (consent decrees ordinarily do not give rise to issue preclusion because the issues are not actually litigated).

Nor does judicial estoppel. ADEQ did not take a position regarding the owner of the UST in the 1995 lawsuit. Rather, ownership was not disputed in that lawsuit because ADEQ relied on Mr. Arnett's representation. *See, e.g., State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996) (discussing the elements of judicial estoppel).

Laches is also unavailing. That principle does not apply against the State or its agencies in matters affecting governmental functions. *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 421, 586 P.2d 978, 982 (1978).

With regard to equitable estoppel, waiver, unclean hands, and election of remedies, the court finds that the circumstances that warrant those defenses are not present here.

IV. ORDERS.

Based on the foregoing, the court makes the following orders. The court finds that Rule 54(b) language is not appropriate at this stage.

IT IS ORDERED finding for ADEQ on Mr. Arnett's defenses of res judicata, collateral estoppel, judicial estoppel, laches, and all the other defenses raised in the Joint Pretrial Statement, except as set forth below.

IT IS FURTHER ORDERED dismissing ADEQ's responsible corporate officer claim.

IT IS FURTHER ORDERED that the findings and rulings set forth above shall govern the further conduct of this litigation.

IT IS FURTHER ORDERED setting a **telephonic** status conference for **May 31, 2013 at 8:30 a.m.** (time allotted: **15 minutes**) for purposes of discussing the further conduct of this litigation, including alternative dispute resolution, and to implement a scheduling order to bring this matter to resolution. Plaintiff's counsel shall initiate the conference call to this division at **602-372-2966**. All persons appearing shall appear on land lines and not on cellular phones, and shall not use the speakerphone features of their telephones, in order to maximize all participants' ability to hear and be heard. Counsel shall have their calendars available for this proceeding.

IT IS FURTHER ORDERED that, **five days before** the status conference, the parties shall lodge with the court either one stipulated proposed scheduling order or competing proposed scheduling orders.

NOTE: All court proceedings are recorded by audio and video method and not by a court reporter. Any party may request the presence of a court reporter by contacting this division (602-372-2966) three (3) court business days before the scheduled hearing.

FILED: Exhibit Worksheet

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.